

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 24, 2006 Session

SCOTT WORLEY v. LISTER DISTRIBUTION, INC.

**Appeal from the Circuit Court for Knox County
No. 3-37-04 Wheeler A. Rosenbalm, Judge**

No. E2005-02932-COA-R3-CV - FILED JUNE 20, 2006

The issue presented in this appeal is whether the trial court correctly held that the employee, who had signed an employment contract granting him severance pay if he was terminated without good cause, was fired without good cause. The trial court held that Lister Distribution, Inc., the employer, failed to demonstrate that it terminated Scott Worley's employment for good cause. The trial court awarded Mr. Worley \$45,000 in severance pay pursuant to the contract. We find that the evidence presented is conflicting and heavily dependent upon credibility assessments, and that the evidence does not preponderate against the trial court's judgment. Consequently, we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed;
Case Remanded**

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL PICKENS FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Michael P. Sayne, Knoxville, Tennessee, and Jennifer Keller, Johnson City, Tennessee, for the Appellant, Lister Distribution, Inc.

James G. Rickman, Maryville, Tennessee, and W. Tyler Chastain, Knoxville, Tennessee, for the Appellee, Scott Worley.

OPINION

I. Background

In August of 2002, Scott Worley began his employment as sales manager for Lister Distribution, Inc., a newly-created company wholly owned by Tom Lister. After a period of negotiation, the parties signed an employment contract. The two-page contract provides in relevant part as follows:

2. TERM. This Agreement shall be effective upon its date of execution for an initial term of five (5) years, and shall continue thereafter from year-to-year unless terminated according to the provisions of this Agreement.

3. POWERS AND DUTIES. Employee shall perform such duties (commensurate with his position and title) as may be assigned to him from time-to-time. Employee shall devote his entire working time, attention, energies, efforts and skills, with undivided loyalty, to the Company's business, and shall use his best efforts to promote the Company's interest and business.

* * *

6. TERMINATION. Employee's employment hereunder shall terminate according to the following provisions:

(e) [sic] By Company For Good Cause. The Company may immediately terminate Employee's employment hereunder by written notice for good cause. If the Company terminates Employee for good cause, the Company shall pay Employee's base salary pro rated through the effective date of Employee's termination of employment hereunder but the Company shall not pay Employee any severance pay or other compensation.

(b) By Company Without Good Cause. The Company may immediately terminate Employee's employment hereunder by written notice without good cause. If the Company terminates Employee without good cause, the Company shall pay Employee Forty-Five Thousand and 00/100 Dollars (\$45,000) within 30 days of the termination date.

The contract provided that Mr. Worley would be paid a salary of \$90,000 per year.

Over the course of the following year, the relationship between Mr. Worley and Mr. Lister, who was running the company, gradually worsened. Mr. Lister testified to the effect that he became dissatisfied with Mr. Worley's efforts at work and his sales production. Mr. Worley testified that he believed Mr. Lister regretted obligating himself to pay Mr. Worley such a high salary, and that Mr. Lister tried to force him to resign by making his life difficult, and when that failed, fired him. Mr. Lister terminated Mr. Worley's employment on December 5, 2003.

Mr. Worley brought this action alleging breach of the employment contract and seeking damages in the amount of \$45,000, the severance pay provided in the contract. Lister Distribution, Inc. ("LDI") answered, denying that it fired Mr. Worley without good cause. After a bench trial, the

trial court found that LDI failed to prove that it fired Mr. Worley for good cause and entered judgment in Mr. Worley's favor.

II. Issue Presented

LDI appeals, raising the sole issue of whether the trial court erred in holding that it did not terminate Mr. Worley's employment for good cause.

III. Standard of Review

In a non-jury case such as this one we review the record *de novo* with a presumption of correctness as to the trial court's determination of facts, and we must honor those findings unless there is evidence which preponderates to the contrary. Tenn. R. App. P. 13(d); *Union Carbide v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to the trial court's factual findings. *Seals v. England/Corsair Upholstery Mfg. Co., Inc.*, 984 S.W.2d 912, 915 (Tenn. 1999). The trial court's conclusions of law are accorded no presumption of correctness. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996); *Presley v. Bennett*, 860 S.W.2d 857, 859 (Tenn. 1993).

IV. Analysis

Under the employment contract, the question of whether Mr. Worley is entitled to \$45,000 in severance pay depends on whether he was terminated for good cause. The parties did not define "good cause" in the contract. In the recent case of *Biggs v. Reinsman Equestrian Products, Inc.*, 169 S.W.3d 218 (Tenn. Ct. App. 2004), we restated the law applicable to termination of an employment contract for cause as follows:

Whether good cause exists to terminate an employment contract is a determination made on a case-by-case basis, and exists where the discharge is 'objectively reasonable.' *Video Catalog Channel, Inc., v. Blackwelder*, 1997 WL 581120 (Tenn.Ct.App.). When cause is required for discharging an employee, the employer has the burden of proving the existence of good cause. *Phillips v. Morrill Electric, Inc.*, 1999 WL 771511 (Tenn.Ct.App.)

The failure to faithfully perform express or implied duties gives the employer the right to terminate the employment contract for cause, prior to the expiration of its terms without incurring liability. *Jackson v. The Texas Company*, 10 Tenn.App. 235 (Tenn.Ct.App.1929).

Inattention to duty is sufficient cause for discharge, since it is incumbent upon the employee to reasonably perform to advance and develop the employer's business. *Wyatt v. Brown*, 42 S.W. 478, 481(Tenn.Ch.App.1897). In general, any act which tends to injure the employer's business, interests, or reputation will justify termination of an employment agreement, and actual loss need not be proven. *Curtis v. Reeves*, 736 S.W.2d 108, 112 (Tenn. Ct. App. 1987). As a general rule, acts which are sufficient to be good cause for dismissal of a manager are quantitatively and qualitatively distinct from those required to terminate an employee possessing less responsibility and discretion. *See Thomas v. Bourdette*, 45 Or.App. 195, 608 P.2d 178 (1980).

* * *

The standard does not require an element of intent to show just cause. Sub-performance that compromises the employer's interest or impedes the company's progress will justify the termination for cause. *See Booth v. Fred's Inc.*, 2003 WL 21998410; *Wyatt v. Brown*, 42 S.W. 478 (Tenn. Ch. App. 1897).

In *Lawrence v. Rawlins*, 2001 WL 76266[,] this Court was faced with interpreting "for cause" termination in the context of the statute providing for the grievance procedure for employees of Tennessee educational institutions...The Court in *Lawrence* rejected the defendant's argument attempting to limit the scope of "for cause" termination to acts of serious misconduct, intentional wrongdoing, and other intolerable behaviors, concluding that the concept is much broader:

We have concluded that an employee has been terminated for cause if the employee's termination stems from a job-related ground. A job-related ground includes any act that is inconsistent with the continued existence of the employer-employee relationship. Thus, an employee has been terminated for cause if the termination stems from the employee's failure to follow a supervisor's directions, poor job performance, or failure in the execution of assigned duties.

Biggs, 169 S.W.3d at 221-22 [internal quotation marks omitted]; *accord Bolen v. Signage Solutions, LLC*, No. E2004-01183-COA-R3-CV, 2005 WL 166956 at *4-5 (Tenn. Ct. App. E.S., Jan. 26, 2005).

The record reveals that much of the evidence, primarily consisting of witness testimony, is sharply disputed on most of the factual matters. The parties' testimony regarding how Mr. Worley came to be hired by LDI provides one illustration of the substantial differences between the parties' accounts. Mr. Worley testified that Mr. Lister contacted him in an attempt to get him to come work for him at his startup business, LDI. Mr. Worley testified that at the time he was satisfied with his current employment, which he felt was stable and secure, stating as follows:

A: I called Tom [Lister] back to tell him that I was not interested; that I was happy at Dealer's Warehouse and wanted to stay where I was. And I thanked him for considering me.

Q: What did he say then?

A: He said, Okay, and he appreciated it. And then a day or two later, he called me back and asked if I wouldn't mind meeting with him again. I asked him why. He said he just wanted to sit and talk with me a little bit more about the business and what it would take to actually get me to come to work there. And so we set up another meeting at the same restaurant.

At the second meeting, Mr. Worley told Mr. Lister that he would come work for LDI for a guaranteed salary of \$100,000 per year. Mr. Worley testified that Mr. Lister told him that "he was willing to offer me ninety thousand dollars and pay all of my expenses."

Mr. Lister testified that he set up the initial meeting with Mr. Worley not to solicit his employment, but because he thought he "might be a good person to use as a sounding board as to the viability of this new business...as a person to simply bounce ideas off of about the Company." Mr. Lister further testified as follows:

Q: How did it come about, Mr. Lister, that you offered Mr. Worley a position with your company?

A: Scott Worley asked me if I had a salesperson, or a sales manager working for me, and if I had planned on hiring one. And I said, "No."

And I was a little bit taken back, because I really didn't think Scott would be interested in leaving Dealer's.

And I said to him, "Scott, if you're interested in the position, I'd love to talk to you about it if you really are interested in the position." And he said he would be. So I then told him I would get back to him. Let me bounce around some numbers. He caught me completely off guard at the first meeting at the restaurant.

And anyway, then he came back to me. We did talk. I called him and he had called me back. He came and said that he wanted one hundred thousand dollars a year, which was a lot more than I had anticipated he would ask for.

Q: Well, had you offered him a job at that point, Mr. Lister?

A: No.

* * *

Q: Okay. So what happened next?

A: Well, I mean, I was brand new. And hadn't even actually started the business. To say I was nervous or scared is an understatement. And one hundred thousand was a lot of money. I had been in it a long time. I had been a very successful salesperson. I had never been guaranteed half of that.

But I was very nervous about it. It would be great to have somebody there that could handle part of the sales and kind of help support me. And so I had told him that the hundred was just more than I thought I could afford this early on before I even opened the doors.

And so I came back to him and offered seventy thousand a year, plus picking up his expenses. And then he came back to me and requested – said he would come down to ninety. And I said, Well, let me think about it, or whatever. I think I called him back and said, "Okay, we can go with the ninety without expenses." And I specifically said that.

* * *

Q: What is the reason that you were willing to do – to give Mr. Worley a guarantee, given the fact that you were a start-up?

A: I specifically told Scott – I emphasized that this is a lot of money, ninety thousand a year. And the reason I’m going to give you this kind of money is because I want a professional. I want somebody working for me that I don’t have to stand over, tell them how to do their job, worry about what they’re doing; something I can just – I can hand the ball to and let them run with it.

And in hindsight, ninety thousand dollars was a lot of money. And so I made perhaps the wrong assumption that paying somebody the money up front would generate the energy, and excitement, and efforts that it would have generated for me.

So I said, Hey, I will give you ninety thousand guaranteed, which I can’t imagine. So I did that. Wow. You know, I would be constantly working or worrying about earning my ninety thousand dollars. I thought it might work that way.

Mr. Worley testified that he worked between 45 and 50 hours per week on average. His primary job responsibility was selling lumber on the wholesale level. He testified without contradiction that “we, each month, sold more board footage than the previous month. All the way from the first month that I was there up until November [of 2003].” Mr. Worley stated that in his opinion, “sales were outstanding.”

The parties had a meeting on September 11, 2003, at which time Mr. Worley had been working for LDI for roughly one year. At that meeting, Mr. Worley requested a raise in his compensation. Mr. Lister attempted to persuade Mr. Worley to accept a compensation package based on straight commission of his sales, but Mr. Worley wanted to continue with the guaranteed \$90,000 per year salary under the contract. Mr. Lister stated that he told Mr. Worley he was not generating enough sales to justify his salary:

A: Basically, this meeting, we sat down and I discussed with Scott my concern about his sales. And the fact that I did not feel he was putting forth his best efforts based on sales figures, based on what I had heard from customers, and I actually broke these numbers down and gave him an idea of commission structures.

* * *

Q: What other plans were developed during this meeting, Mr. Lister, for going forward to make Mr. Worley more successful in your eyes?

A: I told him that if he wanted to maintain the ninety thousand dollar a year salary that was in the contract, that I was going to need to monitor his sales efforts. I needed to know what he’s doing every

moment of the day. Who are you calling on? Why are you calling them? What are you quoting? Who are you seeing? How are you running your route? I've got to know everything.

I have been in this business a long time and I know that his salary isn't justified by his sales. So we have to get his sales up to justify the salary. And I certainly didn't have the time to micromanage everything he was doing. But what choice did I have.

* * *

And so being forced to pay out the ninety thousand dollars a year that was in his contract, I wanted to be sure that I was getting 100 percent of his effort, because I didn't understand how anybody could put forth 100 percent of their effort and generate sales at such a low level. It didn't make sense to me.

Conversely, Mr. Worley testified that Mr. Lister did not tell him at the September 11 meeting that he was disappointed in his sales. Mr. Worley further testified as follows:

A: After the September 11th meeting, we walked out of that meeting. And I told Tom that I was discouraged to hear his comments about not being disappointed if I would quit, that he would just use my salary to hire two more people. He said that from day one he resented me, giving me paychecks for ninety thousand dollars when he only paid himself forty thousand dollars, and that my sales were a disappointment and not what he had expected.

Q: Okay. So then what happened the next day? Did you-all talk?

A: The next day, Tom – I was in my territory making sales calls. Tom called me on my telephone and asked me where I was. And I sarcastically said that I'm in my territory focused one hundred percent on my customers.

Q: And why did you say that?

A: Because at our anniversary meeting, Tom said that instead of me worrying about managerial duties at LDI, to just worry about getting my sales up. And I had told Tom that I felt like that was a step back from what we had talked about; that he just wanted me to do outside

sales at that point, when I was hired on as Sales Manager, and that that was a demotion.

Q: Okay. So you, admittedly, were sarcastic. I mean, were your feelings hurt? Why did you –

A: Yes. I was disappointed and my feeling[s] were hurt. But never in any way did I stop selling to my customers or trying to get all that I could on every sales call.

Q: Okay. So after that September 11th meeting, you continued to work. Tell us – walk us through that afterwards.

A: Well, that's when Tom had, I think, three meeting[s] with me. He was trying to make my life more difficult. He required that I call him from my first stop 7:00 to 7:30, and after I left my last stop after 4:30. He quit paying my expenses...And it was just obvious that he was doing things to irritate me and to try to get me to quit, so that, in my opinion, he could avoid paying me the forty-five thousand dollars that I had outlined in my contract.

Q: Did he ever make statements about paying the forty-five thousand dollars?

A: Yes. After that meeting, he made one statement that said if I had not structured that contract that specifically outlined the forty-five thousand dollars, that he would just simply let me go.

It appears that Mr. Worley generally complied with the additional requirements Mr. Lister gave him after these meetings. Mr. Lister testified that “from what I can remember, he did call in the morning from his first account. And he would call at the end of the day from his last account...I never specifically remember him not doing that after I requested it.” Mr. Lister also testified that Mr. Worley provided him with a written call report after he requested them in September of 2003.

Mr. Lister points to one additional comment made by Mr. Worley as establishing good cause to terminate his employment:

Scott has had an entire year to work Boone, which he testified that he worked before and knew these accounts. They were his good friends and he was going to get a lot of business. And his sales were anemic. And I said, "Well, Scott, can you give me some idea [of] when the territory is going to blossom?"

His answer was, "Well those things take time." And I said, "Well Scott, how much time? And that's when he looked at me and said, "Oh, this is coming from Mister the slower I go, the sooner I arrive."

A very smart aleck tone of voice, that Larry Chambers witnessed. And that is a Chinese proverb that I quote a lot: The slower I go, the sooner I arrive. Meaning, be organized. Plan your day. Work your plan. Don't get all rushed. And I have said that many times.

Larry Chambers, another LDI employee, testified that he heard Mr. Worley make this comment, and also that Mr. Worley later "acknowledged that he shouldn't have made it, and that he was sorry" and apologized to Mr. Lister.

In December of 2003, Mr. Lister terminated Mr. Worley's employment with LDI. Mr. Worley testified that he was given no reason for his termination, and it is not disputed that he did not receive written notice. Mr. Lister testified that he told Mr. Worley he was being fired for "nonperformance."

As the trial court noted, there is little in the record regarding actual numbers of the amount of sales Mr. Worley had generated, or Mr. Lister's expectations regarding sales, or what he considered a reasonable amount of production. The record contains a list of "sales by customer summary" from July through September 2003, listing all of LDI's customers and the amount of sales to each. Mr. Lister highlighted those accounts on the list that he considered to be his accounts. There is a handwritten notation at the bottom of the list that appears to attribute \$926,012.34 of the sales to Mr. Lister, and \$352,378.83 of the sales to Mr. Worley. Mr. Worley, however, testified that the list was not accurate, and that Mr. Lister had taken credit for more sales and accounts than he was actually responsible for, stating:

Q: So if you were to go back and say, "No, Tom, that's my customer;" I mean, he's the boss. He owns it; right? Did you feel like you could go back and say that?

A: I did say that to him. And he said, "I'm the only one that counts. I own this company. That's my customer."

Q: And he's right, isn't he?

A: And that's why I never rebutted that. I just said, "You can make those sales figures look any way you want, Tom, if you put my sales in your column."

Q: Right. And as the owner of the Company, that's his right?

A: Sure.

At trial and on appeal, LDI argued that there were several incidents where Mr. Worley allegedly ignored, mistreated, or failed to call upon certain clients, and therefore it fired him for good cause. Again, however, the testimony regarding these incidents is conflicting; Mr. Worley in his testimony either contradicted or explained these alleged lapses. LDI offered testimony of only one representative of a single client regarding Mr. Worley's conduct, and Mr. Worley presented proof that this witness was a personal friend of Mr. Lister and preferred to deal directly with him by choice, not as a result of any alleged action or inaction of Mr. Worley.

As is evident from the testimony outlined and recounted above, the trial court's assessment of credibility was a critical factor determining the outcome of this case. In *Video Catalog Channel, Inc. v. Blackwelder*, No. 03A01-9705-CH-00155, 1997 WL 581120 (Tenn. Ct. App. E.S., Sept. 19, 1997), this court was presented with the same issue of termination "for good cause," and, as in this case, noted that "substantial differences exist in the parties' versions of the circumstances surrounding the dismissal." *Id.* at *1. The *Blackwelder* court stated that "[c]learly the Chancellor's determination that good cause did not exist is fact intensive and turns on his assessments of witness credibility...the trial court is in the best position to assess the credibility of witnesses, and such determinations are entitled to great weight on appeal." *Id.* at *3.

Based on our review of the record, we conclude that the evidence does not preponderate against the trial court's conclusion that LDI failed to demonstrate that it discharged Mr. Worley with good cause. The evidence is susceptible to a number of reasonable interpretations, including that the true reason Mr. Lister fired Scott Worley was because he did not want to continue paying his \$90,000 salary as agreed to in the employment contract, nor did he want to pay his \$45,000 severance.

LDI argues that the trial court erred by utilizing its own subjective standard in determining whether good cause existed. It is well-established that the correct standard is an objective one. *Biggs*, 169 S.W.3d at 221; *Blackwelder*, 1997 WL 581120 at *3. The transcript clearly reveals that

the trial court was aware of the correct standard, referring to it on several occasions, and that it applied an objective standard in deciding this issue.

V. Conclusion

The judgment of the trial court awarding Mr. Worley \$45,000 in severance pay is affirmed. Costs on appeal are assessed to the Appellant, Lister Distribution, Inc.

SHARON G. LEE, JUDGE